No. 96-1296

In The
Supreme Court of the United States

October Term 1996

THOMAS E. HORTON,

Petitioner,

v.

UNION RECOVERY LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a financial institution has failed, the Resolution Trust Corporation ("RTC") has been appointed receiver for the institution, and the RTC has assigned by way of sale and transfer a note in favor of the failed bank to an assignee, does the assignee stand in the shoes of the RTC with respect to the expanded statute of limitations set forth in the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") so that the assignee may enforce the note purchased from the RTC?

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OPINIONS BELOW

The opinion of the Supreme Court of Virginia (Pet. App. A-1 - A-11) is reported at 252 Va. 418, 477 S.E.2d 521 (1996). The order and opinion of the trial court (Pet. App. A-12 - A-20) are not reported.

JURISDICTION

Petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1257(a). As set forth below, the only issue of federal law is whether FIRREA addresses the assignability of the right to pursue a promissory note pursuant to the expanded statute of limitations of FIRREA. Determining that FIRREA does not address this issue, the Supreme Court of Virginia resolved the remaining issues under Virginia law.

STATUTES

I. Portions of Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")

A. Statute of Limitations Provision, 12 U.S.C. § 1821(d)(14)

(A) Notwithstanding any provision of any contract, the applicable statute of

limitations with regard to any action brought by the Corporation as conservator or receiver shall be --

(i) in the case of any contract claim, the longer of --

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law;

* * * * *

(B) For purposes of subparagraph (A), the date on which the statue of limitations begins to run on any claim described in such subparagraph shall be the later of --

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues

B. Provision Conferring Same Powers on RTC as on Federal Deposit Insurance Corporation, 12 U.S.C. § 441a(B)(4)(A)(1994)

> . . . the Corporation[1] shall have the same powers and rights to carry out its duties with respect to institutions . . . as the Federal Deposit Insurance Corporation . . . .

C. Purposes of FIRREA, 12 U.S.C. § 1811 note, Purposes of 1989 Amendment (1994) (Pub. L. No. 101-73, § 101, 103 Stat. 183, 187 (1989)

> The purposes of this Act are as follows:
>
> * * * * *
>
> (8) To provide funds from public and private sources to deal expeditiously with failed depository institutions.
>
> * * * * *

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[1] "[T]he Corporation" refers to the RTC.

II. Provision of Uniform Commercial Code as Enacted in Virginia Addressing Rights Vested in Transferees Upon Transfer of Negotiable Instruments, Va. Code § 8.3A-203(b) (Supp. 1995)

> Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

STATEMENT

Petitioner Thomas E. Horton ("Horton" or "Petitioner") borrowed $80,000 from Federal Savings Bank of Virginia ("the Bank") on June 8, 1989, which was memorialized by a promissory note executed by Petitioner. Pet. App. A-2. The Bank subsequently failed, and the RTC was appointed as its receiver on April 10, 1992. Id. As receiver for the Bank, the RTC acquired all right title and interest in the assets of the Bank including the Horton note. Id. On June 26, 1995, Union purchased the right

to enforce the Horton note and was assigned all right, title and interest in the note. Pet. App. A-2; A-22, A-28. Union initiated litigation to enforce the Horton note on August 30, 1995. Pet. App. A-2.

Under FIRREA, the statute of limitations for claims brought by the RTC to enforce contractual obligations owed to failed financial institutions is not less than six years from the date the RTC was appointed receiver for the institution. 12 U.S.C. § 1821(d)(14)(A)(i)(1994); 12 U.S.C. §1441a(B)(4)(A)(1994).[2] The RTC was appointed receiver for the Bank on April 10, 1992. Pet. App. A-2. Thus, as all parties acknowledge, the RTC had until April 9, 1998, to bring an action to enforce the Horton note. Pet. App. A-7. As the purchaser of the note from the RTC, Union was an assignee of the RTC and submitted, as supported by the decision of **every appellate court to have considered the issue**,[3] that it stood in the shoes of the RTC for purposes of enforcing the note pursuant to FIRREA's six-year statute of limitations. Pet. App. A2 - A3.

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[2] The statute of limitations period under FIRREA is the longer of six years or the period applicable under State law. 12 U.S.C. § 1821(d)(14)(A)(1994).

[3] See infra at 17.

Horton asserted that Union was not entitled to stand in the shoes of the RTC with respect to the statute of limitations and that Union was time-barred from enforcing the note he signed. Pet. App. A-3. Horton argued that Union did not stand in the shoes of the assignor and that therefore the statute of limitations reverted to the shorter Virginia statue of limitations upon transfer of the note to Union. Id. Under the shorter Virginia statue of limitations, Union's action would have been time barred. Id. The parties filed briefs on the issue of the statute of limitations, and oral argument was held. Id. The trial court held that Union was barred by the Virginia statute of limitations from enforcing the Horton note. Id. The factual bases of the trial court's ruling were the facts alleged in the pleadings and other papers filed by the parties, and no evidentiary hearing was necessary. Pet. App. A-24. Union filed a Motion for Reconsideration, which was denied. Pet. App. A-3.

Union petitioned the Supreme Court of Virginia to decide the statute of limitations issue, and the Supreme Court of Virginia agreed to hear Union's appeal. Pet. App. A-4. The parties briefed the issue, and oral argument was held. On November 1, 1996, the Supreme Court of Virginia reversed the decision of the trial court. Pet. App. A-1 - A-11. The Supreme Court of Virginia held

in a unanimous decision that "it is well established law in Virginia that an assignee obtains his rights from the assignor, and, thus, he is said to 'stand in the shoes' of the assignor when pursuing an action on the contract or instrument assigned." Pet. App. A-7. The Supreme Court of Virginia further held that FIRREA did not address the issue of whether FIRREA's extension of the statute of limitations was assignable. Pet. App. A-10. Thus, the Supreme Court of Virginia applied Virginia law and held that Union purchased the right to enforce the note under FIRREA's extended statute of limitations. Pet. App. A-7 - A-11. The Supreme Court of Virginia thus denied Petitioner Horton the windfall for which he had argued.

ARGUMENT

Petitioner argues that the Supreme Court of Virginia disregarded the language of the FIRREA statute and created new federal common law in holding that Union was entitled to enforce the note it purchased from the RTC. In fact, the Supreme Court of Virginia determined that the FIRREA statute is silent on the issue of assignability and thus applied Virginia law to the issue. Petitioner also asserts that there is "a substantial possibility" of a split in appellate authority over the issue presented by

this petition, even though all 12 appellate decisions to date have rejected Petitioner's position. Petitioner's arguments fail. His petition should be denied.

I. THE DECISION OF THE SUPREME COURT OF VIRGINIA IS NOT INCONSISTENT WITH DECISIONS OF THIS COURT

A. FIRREA Is Silent on Whether the Right to Enforce a Note Pursuant to FIRREA's Extended Statute of Limitations Is Assignable

Plaintiff argues that the plain language of FIRREA renders the right to enforce an instrument pursuant to FIRREA's extended statute of limitations non-assignable. Not so. Nowhere does FIRREA address whether its extended statue of limitations is assignable.[4] The

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[4] A reading of the relevant provisions of the FIRREA statute confirms that FIRREA does not address this issue. The relevant portion of the FIRREA statute provides: "Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be (i) in the case of any contract claim, the longer of -- (I) the 6-year period beginning on the date the claim accrues; or (II) the period applicable under State law." 12 U.S.C. § 1821(d)(14). The statute simply does not mention assignability. Indeed, one of the express purposes of FIRREA was to "provide funds from . .

Supreme Court of Virginia and every other appellate court to have considered the issue have agreed that FIRREA is silent on the issue of whether the right to enforce an instrument pursuant to its extended statute of limitations is assignable. See decision of Virginia Supreme Court below, Pet. App. A-10; FDIC v. Bledsoe, 989 F.2d 805, 809 - 810 (5th Cir. 1993); Jackson v. Thweatt, 883 S.W.2d 171, 175 (Tex. 1994); Cadle Co. II, Inc. v. Lewis, 864 P.2d 718 (Kan. 1993), cert. denied, 114 S.Ct. 1613 (1994); Tivoli Ventures, Inc. v. Bumann, 870 P.2d 1244, 1248 (Colo. 1994); Central States Resources Corp. v. First Nat'l Bank, 501 N.W.2d 271 (Neb. 1993); Investment Co. v. Reese, 875 P.2d 1086, 1092 (N.M. 1994); NSO Assocs v. Beychok, 659 So.2d 729 (La. 1995); Twenty First Century Recovery, Ltd. v. Mase, 665 N.E.2d 573, 576 (Ill. App. 1996); Cadle Co. II v. Stamm, 633 So. 2d 45, 46 (Fla. Dist. Ct. App. 1994): White v. Moriarty,

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. private sources to deal expeditiously with failed depository institutions", which can only be accomplished if the RTC and FDIC are able to sell their assets to private sources. See infra at 14-16. Thus, Congress intended what the Supreme Court of Virginia held -- that the long-standing principle that an assignee stands in the shoes of the assignor should provide the rule of decision. Congress is presumed to have known that this was the law (of every jurisdiction of which Respondent is aware) when it enacted FIRREA. See, e.g. Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).

19 Cal. Rptr. 2d 200 (Ct. App. 1993); Martin v. Cadle Co., No. 96438, 1993 WL 381101 (Id. Ct. App. 1993). Where a statute is silent, courts may look to state law for the rule of decision. See O'Melveny & Myers v. FDIC, 114 S.Ct. 2048, 2054 (1994). In this case, the Supreme Court of Virginia looked to the law of Virginia:

> It is **well established law in Virginia** that an assignee obtains his rights from the assignor, and, thus, he is said to 'stand in the shoes' of the assignor when pursuing an action on the contract or instrument assigned.

Pet. App. A-7 (emphasis added). The Supreme Court of Virginia applied the principle of Virginia law that an assignee stands in the shoes of the assignor, because FIRREA is silent on this issue.

That an assignee stands in the shoes of the assignor for purposes of enforcing an instrument has long been the common law of Virginia. See, e.g., National Bank & Trust Co. at Charlottesville v. Castle, 196 Va. 686, 692-93, 95 S.E.2d 228, 232 (1955) (cited by Supreme Court of Virginia at Pet. App. 7 for proposition that assignee stands in the shoes of an assignor) Though not cited by the Supreme Court of Virginia, the

principle that an assignee stands in the shoes of the assignor for purposes of enforcing an instrument is also Virginia statutory law. The negotiable instrument at issue in this case was assigned by way of sale and transfer from the RTC to Union. Pet. App. A-33, A-45 - A-46. The Uniform Commercial Code as enacted in Virginia provides that "[t]ransfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument . . . ." Va. Code § 8.3A-203(b) (Supp. 1995) (emphasis added). FIRREA's extension of the statute of limitations "clearly creates a right" to enforce negotiable instruments. See NSO Assocs v. Beychok, 659 So.2d 729, 733 (La. 1995); Jackson v. Thweatt, 883 S.W.2d 171, 176 (Tex. 1994); Investment Co. v. Reese, 875 P.2d 1086, 1093 (N.M. 1994). Thus, the transferee of a negotiable instrument is vested with the right to enforce the instrument pursuant to FIRREA's extension of the statute of limitations. That an assignee stands in the shoes of the assignor is a bedrock principle of Virginia law (and in every jurisdiction of which Respondent is aware).[5]

Ultimately, Petitioner does not challenge the principle that an assignee stands in the shoes of the assignor.

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[5] Congress is presumed to have known the law when it enacted FIRREA. See, e.g., Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).

Rather, he argues that the "plain language" of the FIRREA statute somehow precludes assignment of that right pursuant to state law. This is simply not so. The statute is silent on the issue of assignability. Accordingly, the Supreme Court of Virginia appropriately applied the principle of Virginia law that assignees stand in the shoes of their assignors.[6]

B. The Decision of the Supreme Court of Virginia Is Not Inconsistent with O'Melveny & Myers v. FDIC

1. The Supreme Court of Virginia Properly Relied on Virginia Law Where FIRREA Was Silent on Whether the Right to Enforce a Note Pursuant to FIRREA's Extended Statute of Limitations Is Assignable

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[6] Petitioner's argument that the legislative history of FIRREA does not contemplate the sale of instruments to private sources is breathtaking. One of the express purposes of FIRREA was "[t]o provide funds from public and **private sources** to deal expeditiously with failed depository institutions." 12 U.S.C. § 1811, Purposes of 1989 Amendment (1994) (Pub. L. No. 101-73, § 101, 103 Stat. 183, 187 (1989))(emphasis added). See infra at 14-16.

Petitioner argues that the decision of the Supreme Court of Virginia is inconsistent with that of O'Melveny & Myers v. FDIC, 114 S.Ct. 2048 (1994). Petitioner cites the language of O'Melveny which held that generally "matters left unaddressed [by a statutory scheme such as FIRREA] are presumably left subject to the disposition provided by state law." O'Melveny, 114 S. Ct. at 2054. Petitioner then seems to argue that the Supreme Court of Virginia ignored the law of Virginia and created a new rule of federal common law in holding that the note at issue could be enforced. That is not what happened. The Supreme Court of Virginia held **as a matter of Virginia law** that an assignee stands in the shoes of the assignor. The critical passage from the opinion of the Supreme Court of Virginia bears repeating:

> It is **well established law in Virginia** that an assignee obtains his rights from the assignor, and, thus, he is said to 'stand in the shoes' of the assignor when pursuing an action on the contract or instrument assigned.

Pet. App. A-7 (emphasis added). The Supreme Court of Virginia did just what Petitioner argues it should have done. It applied Virginia law where FIRREA was silent.

2. Even if the Supreme Court of Virginia Had Applied Federal Common Law, the Application of Such Federal Common Law Would Have Been Entirely Consistent With O'Melveny & Myers v. FDIC and Other Decisions of This Court

If the decision under Virginia law had been that urged by Petitioner -- that the note became unenforceable upon being purchased by Union -- the Supreme Court of Virginia would have been required to apply federal common law under principles articulated in the O'Melveny decision and other decisions of this Court. The O'Melveny decision teaches that while there is no "federal general common law", courts should create a rule of federal common law where there is "significant conflict between some federal policy or interest and the use of state law." O'Melveny, 114 S.Ct. at 2055 (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)). Certainly, there are cases where a rule of federal common law is required. For example, in Boyle v. United Technologies Corporation, 487 U.S. 500 (1988), this Court held that private defense contractors doing business with the federal government inherit the government's immunity from

tort liability, even though the federal statute conferring such immunity upon the government does not mention private contractors. In other words, private defense contractors stand in the shoes of the government for purposes of tort immunity. Otherwise, there would have been a significant conflict between state law and federal policy.

So it would have been here (if Virginia law had been interpreted as Petitioner urges it should have been). One of the purposes of FIRREA was to "provide funds from public and **private sources** to deal expeditiously with failed depository institutions." 12 U.S. C. § 1811, Purposes of 1989 Amendment (1994) (Pub. L. No. 101-73, § 101, 103 Stat. 183, 187 (1989) (emphasis added). If Virginia law had been interpreted as Petitioner urges, to render an enforceable negotiable instrument unenforceable simply because it has been purchased from the RTC or FDIC by a **private source**, Virginia law would have been directly at odds with federal policy as expressly articulated in the FIRREA legislation. This federal policy was aptly explained in Fall v. Keasler, No. C 90 20643 SW (ARB) 1991 WL 340182 (N.D. Cal. 1991):

> To hold that assignees are relegated to the state statute of limitations would serve only to shrink the private market

> for the assets of failed banks. It would require the FDIC [or RTC] to hold onto and prosecute all notes for which the state statute of limitation has expired because such obligations would be worthless to anyone else. This runs contrary to the policy of allowing the FDIC [or RTC] to rid the federal system of failed bank assets. The FDIC [or RTC] can only make full use of the market in discharging its statutory responsibilities if the market purchasers have the same rights to pursue actions against recalcitrant debtors as does the FDIC [or RTC].

The position argued by Petitioner, that enforceable notes become unenforceable upon being assigned by way of sale to private parties, is repugnant to express federal policy. In this case, the decision of the Supreme Court of Virginia applying Virginia law is consistent with federal policy. If the result under Virginia law had been that urged by Petitioner, however, application of federal common law would have been required under the principles articulated

in O'Melveny and other decisions of this Court.[7]

II. THE 12 APPELLATE COURTS TO HAVE ADDRESSED THE ISSUE FOR WHICH PETITIONER SEEKS A WRIT OF CERTIORARI HAVE BEEN UNANIMOUS: AN ASSIGNEE OF THE RTC OR FDIC STANDS IN THE SHOES OF THE RTC OR FDIC FOR PURPOSES OF ENFORCING A NEGOTIABLE INSTRUMENT PURSUANT TO FIRREA'S EXTENDED STATUTE OF LIMITATIONS

The 12 appellate courts to have considered the issue for which petitioner seeks a writ of certiorari have been unanimous in holding that an assignee of the RTC or FDIC stands in the shoes of the RTC or FDIC for purposes of enforcing a negotiable instrument under FIRREA's extended statute of limitations. See decision of Virginia Supreme Court below, Pet. App. A-1 - A-11; FDIC v. Bledsoe, 989 F.2d 805 (5th Cir. 1993); Jackson v. Thweatt, 883 S.W.2d 171 (Tex. 1994); Cadle Co. II, Inc. v. Lewis, 864 P.2d 718 (Kan. 1993), cert. denied, 114 S.Ct. 1613 (1994); Tivoli Ventures, Inc. v. Bumann, 870 P.2d 1244 (Colo. 1994); Central States Resources Corp. v. First Nat'l

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[7] Petitioner devotes two pages of his Petition for Writ of Certiorari to addressing the Court's decision in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). The Supreme Court of Virginia did not rely on the D'Oench Duhme decision.

Bank, 501 N.W.2d 271 (Neb. 1993); Investment Co. v. Reese, 875 P.2d 10896 (N.M. 1994); NSO Assocs v. Beychok, 659 So.2d 729 (La. 1995); Twenty First Century Recovery, Ltd. v. Mase, 665 N.E.2d 573 (Ill. App. 1996); Cadle Co. II v. Stamm, 633 So. 2d 45 (Fla. Dist. Ct. App. 1994): White v. Moriarty, 19 Cal. Rptr. 2d 200 (Ct. App. 1993); and Martin v. Cadle Co., No. 96538, 1993 WL 381101 (Id. Ct. App. 1993). Petitioner does not disagree that the Nation's appellate courts speak with one voice on this issue. Instead, Petitioner speculates that an aberrational decision may be rendered in the future. The Court should not grant a writ of certiorari based on petitioner's mere speculation.[8]

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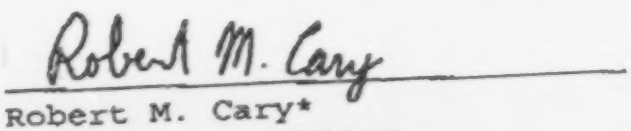
[8] That the Supreme Court of Virginia's decision is inconsistent with the prior decision of one federal trial court sitting in Virginia, Wamco III, Ltd. v. First Piedmont Mortgage Corporation, 856 F.Supp. 1076 (E.D. Va. 1994), does not render this case worthy of a writ of certiorari. First, if the Wamco court were to reconsider the issue with the benefit of the Supreme Court of Virginia's decision (which expresses Virginia law and was not available when the Wamco court reached its decision), the Wamco court would probably reach a different result. Second, of course, the appellate courts to have addressed the issue are unanimously consistent with the decision of the Supreme Court of Virginia.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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